No. 175.

Brief of Lichliter for Appellees

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No. 175.

THE STEAM TUG "JOHN G. STEVENS," HER ENGINES, &c., EDWARD H. LOUD, AND OTHERS,

Claimants and Appellants,

vs.

FREDERICK H. GLADWISH, AND OTHERS,

Libellants and Appellees.

On Certificate from the United States Circuit Court of Appeals for the Second Circuit.

Brief on Behalf of Appellees.

J. H. LICHLITER,
Proctor for Appellees.

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Of Counsel.

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Supreme Court of the United States,

October Term 1896, No. 175.

The steamtug "JOHN G. STEVENS" her engines, &c., EDWARD H. LOUD and others,
Claimants and Appellants,

vs.

FREDERICK H. GLADWISH, & ors.,
Libellants and Appellees.

Brief for Appellees.

This case comes before the Court on a certificate from the United States Circuit Court of Appeals for the Second Circuit (Rec. p. 1). A decree in admiralty was made by the District Court for the Eastern District of New York, adjudging that the libellants and appellees, Frederick H. Gladwish and others, recover against the steamtug John G. Stevens, the amount reported due them by the commissioner with interest and costs, amounting in all to $218.07 and further adjudging that the lien of the appellees is a superior lien and entitled to priority over the lien of the appellants, Edward H. Loud and others, and that the balance of the proceeds of sale of the steamtug be paid out of the registry to the appellees.

The appellants took an appeal from the decree of the

District Court to the Circuit Court of Appeals, which thereupon certified the question stated below, in substance, upon the following facts, as set forth in the certificate (pp. 1 & 2).

Statements of Facts.

"1. That the home port of the tug is New York.

2. That between December 7th, 1885, and March 9th, 1886, Gladwish, Moquin & Company furnished coal to the tug in her home port, and filed notices of liens therefor under the laws of the State of New York, Chap. 482 of the Laws of 1862, thereby creating statutory liens on her.

3. That on March 8th, 1886, the tug "J. G. Stevens" was employed in the port of New York to tow the schooner "C. R. Flint" through the waters of said port, and while towing, negligently allowed the "Flint" to collide with the bark "Doris Eckhoff" in tow of the tug "R. S. Carter."

4. On March 16th, 1886, Loud, et al., owners of the "Flint", libelled the "Stevens" and the "Carter", in admiralty, in the District Court of the United States, for the Eastern District of New York, for the collision damage.

5. On March 16th, 1886, Gladwish, et al., libelled the "Stevens", in the same Court, to enforce their supply lien under the State law.

6. The Loud libel resulted in a decree condemning both tugs for damages exceeding $15,000.

7. The Gladwish libel resulted in a decree condemning the "Stevens" for the coal supplied and costs, in all $218.07.

8. The District Court awarded priority to the supply lien, which exhausts the fund resulting from the sale of the "Stevens", leaving the Loud decree unsatisfied."

QUESTION.

Does the damage lien against the tug for negligent towage, outrank the prior lien for supplies?

Despite the fact that the towage of vessels in the har-

bors, ports and inland waters of this country has become an important part of commerce during the past fifty years, the question certified is for the first time presented to this Court, as well as the cognate point whether the collision lien of pure tort, outranks the material man's lien arising *ex contractu*.

Upon the precise question before the Court, the authorities in the District Courts are in conflict, those in the Southern and Eastern Districts of New York, (*The Samuel J. Christian*, 16 Fed. Rep., 797: *The Young America*, 30 Id., 789; *The J. G. Stevens*, 58 Id., 792,) preferring the material man's claim, while the District Court of New Jersey,(*The M. Vandercook*, 24 Id., 472,) and the District Court of Michigan, (*The Daisy Day*, 40 Id., 538,) hold the other way.

Upon the like important question whether a collision lien for tort, pure and simple, arising *in invitum*, and not like the lien for negligent towage, out of a voluntary contract with the vessel—outranks a claim *ex contractu*, there is also a conflict of authority. The Circuit Court for the Eastern District of New York, (*The R. S. Carter*, 40 Fed. Rep., 331,) gives the collision lien a priority, while the District Court for the Southern District of New York, (*The Amos D. Carver*, 35 Id., 665,) prefers the contractual lien.

As throwing a side light upon the subject in controversy, it may be added that the District Courts in the Southern and Eastern Districts of New York and Michigan have accorded priority to seamen's wages over damage liens, (*The Orient*, 10 Ben., 620; *The Samuel J. Christian*, supra, *The Daisy Day*, supra,) while the District Court of New Jersey, (*The Maria and Elizabeth*, 12 Fed. Rep., 627,) and the Circuit Court of Appeals in the Seventh Circuit, (*The F. H. Stanwood*, 49 Id., 577,) give the damage lien the preference even over seamen's wages.

In this conflict of authority in the Courts below, it is eminently desirable that this Court should settle the rank not only of the lien for a *quasi* tort, like the present, but also of the collision lien as against a lien for wages or supplies.

POINTS.

I.

A maritime lien is not a mere privilege to arrest the vessel for debt but a property right or interest in the vessel.

In the *Yankee Blade*, 19 Howard, 82, 89, 90, (1856), this Court through Mr. Justice Grier, said: "The maritime privilege or lien is adapted from the civil law and imports a tacit hypothecation of the subject of it. It is a *jus in re* without possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding in rem."

"These principles will be found stated and fully vindicated by authority in the cases of the Young Mechanic, 2 Curtis C. C., 404, and The Kiersage, 2 Curtis C. C., 421."

Both the decisions referred to, in the case cited, were rendered by Mr. Justice Curtis in cases of liens given by statute in Maine for supplies and repairs to a vessel in her home port.

In the case of the *Lottawanna*, 21 Wall, 558, 579, this Court in considering a lien given by a Louisiana Statute for repairs held "A lien is a right of property and not a mere matter of procedure."

In the recent case of the *J. E. Rumbell*, 148 U. S., 1, Mr. Justice Gray in considering the status of a lien under an Illinois Statute for supplies furnished to a domestic vessel, examined this question again, and after citing, with others, the cases above mentioned, remarked, (p. 11,) that the view of Mr. Justice Curtis, in the cases of the *Young Mechanic* and the *Kiersage* "has been generally accepted in the Admiralty Courts of the United States."

Our adversary sought in the Courts below, to make some distinction between the status of a statutory lien and the lien given by the general maritime law.

Whatever may have been said as to this distinction in the earlier cases, it is now abundantly settled that the lien

given under the maritime law and the statutory lien for domestic supplies, stand as to their rank and enforcement, upon the same footing in a court of admiralty.

The Guiding Star, (Circuit Ct., Stanley Matthews, J.) 18 Fed. Rep., 263.
The General Burnside, (Circuit Ct., Baxter J.) 3 Id., 228
The Madrid, (Circuit Ct., Lamar, J.) 40 Id., 677.
The J. E Rumbell. 148 U. S., 1.
The J. W. Tucker: (2nd Circuit) 20 Fed. Rep., 129.
The Arctic, (2nd Circuit,) 22 Id., 126.
The Amos D. Carver, (2nd Circuit) 35 Id., 678.

In the *Guiding Star*, ibid, Mr. Justice Matthews, after examining the question, gave his conclusion in the following language:

"So that, in enforcing the statutory lien in maritime causes, admiralty courts do not adopt the statute itself, or the construction placed upon it by courts of common law or of equity when they apply it. Everything required by the statute as a condition on which the lien arises and vests, must, of course, be regarded by courts of admiralty, for they can only act in enforcing a lien when the statute has, according to its terms, conferred it; but beyond that the statute, as such, does not furnish the rule for governing the decision of the cause in admiralty, as between conflicting claims and liens. *The maritime law treats the lien, because conferred upon a maritime contract by the statute, as if it had been conferred by itself, and consequently upon the same footing as all maritime liens; the order of payment between them being determinable upon its own principles.*" 18 Fed. Rep., 268. This language of Mr. Justice Matthews was quoted with approval by Mr. Justice Gray in the Rumbell Case 148 U. S. 20.

In the *Madrid*, ibid, Mr. Justice Lamar, after alluding to the then conflict of authority in the Circuits upon the question, proceeded to consider it upon principle and concluded:

"There would seem to be no reason, on principle, why the lien created by the local statute should not rank with the lien given by the general maritime law. They each have as a basis the furnishing of necessary supplies to the ship, upon the credit of the ship itself. In each instance the contract is maritime. The proceedings by which the lien, in each instance, is enforced are identical. * * * It would seem, therefore, that this lien given by the local statute, based, as it is, upon the same sort of necessaries as constitute a lien under the maritime law, (the contract for furnishing these supplies being maritime, and capable of enforcement by proceedings *in rem* only in the admiralty courts of the United States, under the same rules and proceedings as the general maritime lien,) is itself in the nature of a maritime lien." 40 Fed. Rep., 681.

In the *J. E. Rumbell*, ibid, Mr. Justice Gray, after collating the cases upon the question, uses this language: "According to the great preponderance of American authority, therefore, as well as upon settled principles, the lien created by a statute of a State, for repairs or supplies furnished to a vessel in her home port, has the like precedence over a prior mortgage (that was the precise point before the Court in the case), that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law, as recognized and adopted in the United States. * * * The admiralty courts of the United States, enforcing the lien because it is maritime in its nature, arising upon a maritime contract, must give it the rank to which it is entitled by the principles of the maritime and admiralty law.,' 148 U. S., 19.

II.

The material man's lien and the damage lien caused by negligent towage, both arise out of a voluntary contract with the tug, and the former lien being earlier in inception, and for the benefit of the latter, is preferred.

Regarding a maritime lien, then, as a *jus in re*, a property interest in the vessel, the question next present-

ed is, what rank is accorded to it with reference to a lien of subsequent inception.

1. The later claim may be preferred to the earlier one, owing to laches in the enforcement of the earlier [*The J. W. Tucker*, 20 Fed. Rep., 129 and cases cited on pp. 133 and 134.] No such principle is applicable in this case, as both claims accrued and *were enforced contemporaneously*, the supplies being furnished between December 7, 1885, and March 9, 1886, and the claim for damage arose March 8, 1886. Record pp. 1 & 2.

2. The later lien may be preferred to the earlier one, as the latter is benefitted or preserved by the former, as for example, later claims for repairs have priority over prior claims of the same kind, as these repairs by preserving or enhancing the value of the vessel, benefit the older lien. (*The Omer*, 2 Hughes, 86, *The Melita*, 3 Ibid, 194.) Upon the same principle, bottomry bonds are preferred in the inverse order of their creation, (*The Brig Magoun*, Olcott, 55, 66; *The Sydney Cove*, 2 Dods, 1,) and a later salvage takes precedence over a prior salvage "because the last service has preserved the benefit of the former." (*The J. W. Tucker*, 29 Fed. Rep. 129, at p. 132.) This rule is of ancient origin. 3 Twiss, Black Book of the Admiralty, c. 61, p. 163, 2 Valin. Comm. 12 liv. 3, title 5, art. 10.

"But the principle governing such cases," says Mr. Justice Blatchford in *The F. J. Fowler*, 17 Fed. Rep., p. 656, "is, that the services performed at the latest hour are most efficacious in bringing the vessel and her freightage safely to their final destination; and that 'each foregoing incumbrance therefore, is actually benefited by reason of the succeeding incumbrance.' This principle can have no place except where services are rendered, such as loaning money, furnishing supplies, making repairs, salvage and claims arising out of contract, generally; such services benefit the vessel, make her better, preserve her, contribute to save her or improve her or keep her in running or going order for the benefit of all who have prior liens or claims on her. But a second tort or collision can have no such effect in reference to a party injured by a prior tort or collision. The second tort or collision does not benefit the vessel or add to her value or preserve her. It only tends to injure her, and the sufferer by the first tort or

collision, in having recourse against the vessel after a second tort or collision, must take her as he finds her, damaged, perhaps, by a second collision. He ought not to lose the benefit of his lien arising out of the first tort or collision, unless the circumstances are such that in judgment of law he may fairly be held to have waived his lien, or postponed it, as regards the lien arising out of the second tort or collision."

These observations of Mr. Justice Blatchford are made in comparing the rank of successive claims for tort, arising out of negligence in the performance of a towage contract, but the reasoning is applicable with greater force in the ranking of an earlier lien arising *ex contractu* with the subsequent lien arising *ex delicto*. For if a lien for a claim which in no way tends to benefit the vessel or enhance her value, is thus given a priority, the inevitable and necessary conclusion follows that such preference will also be accorded to an earlier lien for supplies or repairs which does in fact tend to the betterment of the vessel, while the later lien for damage tends only to the injury of the vessel and diminishes her value.

3. Where, then, the earlier claim stands in no relation of "demerit or obligation" to the later one, the rule is "*qui prior est tempore, potior est jure.*" That rule, which we invoke in the case at bar, was adopted in the District Court (58 Fed. Rep., 792).

Maclachlan in his Treatise on Shipping, (3 Ed. p. 703,) in considering the rank of successive claims for collision, clearly emphasizes this underlying principle that the earlier claim is preferred, as it stands in no relation of "*demerit or obligation*" to the later one, in the following language: "Of two successive collisions with the same ship, *the sufferers by the earlier, standing to the sufferers by the later, in no relation of demerit or obligation, retain their priority of claim against the fund* on the principle of the legal maxim, *qui prior in tempore, potior est in jure.*"

The ranking of claims according to the time of their inception has been a settled principle of admiralty jurisprudence from the earliest times.

In 4 Twiss, *Black Book of the Admiralty*, p. 47, a translation of the ordinance of the Maritime Court of the Noble City of Amalphia, commonly called the Amalphiton Table touching the rank of those who have advanced money to build the ship—is as follows:

"And if by chance the said vessel shall have made a voyage and shall afterwards be sold at the instance of the said creditors, the purchase money received for that vessel ought to be distributed in this manner; first one ought to pay the servants and mariners of the ship for that which it is acknowledged that they ought to receive for their pay, *and then those who are proved to have lent money on the building of such ship according* **as each has priority in time."**

In the case of *The Jerusalem*, 2 Gallison, 345, Mr. Justice Story, in considering [p. 350] the relative rank of a bottomry bond, and a later claim for repairs, said that upon general principles, the rule would seem to apply *qui prior est tempore, potior est jure*, and only gave the later claim a priority, because the repairs were indispensable for the security of the ship, *and actually increased her value.*

In the case of *The F. J. Fowler*, supra, Mr. Justice Blatchford followed this rule, using the following language: "There is no principle of the maritime law, and no interest of commerce or navigation, which requires that the elder lienor, not guilty of laches, and not having committed any waiver or abandonment, should have his claim postponed to that of the younger lienor" (17 Fed. Rep., 656.)

The District Judges of the Eastern and Southern Districts of New York, have also followed the rule of priority we have last set forth. (*The Samuel J. Christian*, 16 Fed. Rep,, 796; the *J. W. Tucker*, 20 Id., at p. 133; the *Young America*, 30 Id., 789, and the case at bar, 58 Id., 792.)

III.

The lien for negligent towage, is analagous to that of cargo damage, which is inferior to the lien for materials and supplies.

The relation of the vessel in tow to the vessel towing, has been considered by the authorities as similar to that sustained by cargo.

The Alabama & Gamecock, 2 Otto, 695, at p. 697.
Sturgis vs. Boyer, 24 How., 110, at p. 122.
J. P. Donaldson, 21 Fed. Rep.,671, at p. 680.
Young America, 30 Id., 800.
Daisy Day, 40 Id., 538, at p. 540.

"Conceding therefore, that a vessel in tow and without fault is to be regarded as sustaining the same relation to the collision which is sustained by cargo (and it seems fair thus to consider it,") etc. Bradley J. in *Alabama & Gamecock*, supra at p. 697.

"The master of the towing vessel commands and directs, not only his own, but the vessels in tow, as though all together constituted but one ship; the tow is intrusted to his care * * * and subject to his power *as though it was mere freight.*" Matthews J., in the *J. P. Donaldson*, supra.

"Where the tow is completely under the control and management of the tug, the case, as respects the point under consideration [*i. e.* the question of priority] is perfectly analagous to injury of cargo on board the guilty ship." Brown J., in the *Young America*, supra.

This similarity of relation of the lien for negligent towage, and that of cargo damage, was conceded by our adversary in the courts below.

As before stated, (p. 3) there are no precedents to the point at the head hereof, in this Court, and none in England, for damage liens to cargo are not allowed there.

The Gratitude, 42 Fed. Rep., 300.
Maclachlan vs. Shipp., (3 Ed.,) p. 108.

In the District Courts, there is a conflict, as also before

stated, between the cases of *Samuel J. Christian*, the *Young America*,, the *Gratitude*, the *J. G. Stevens*, supra, which prefer the material man's lien, while the *M. Vandencook* and the *Daisy Day*, supra, hold that the damage lien takes precedence.

The rule is well settled in other countries, as shown in the elaborate and exhaustive consideration of the question in the case of the *Young America*. It is there said:

"The maritime law, as embodied in the codes of the principal maritime nations from the Marine Ordinance of Louis XIV, downward, not only gives no support to the doctrine that damage liens are entitled to a priority over liens *ex contractu*, but affords abundant evidence to the contrary. In the ordinance of 1681, the damage claims of merchant freighters were ranged in the last rank, below the liens of seamen or material men that accrued during the voyage or prior to departure." Then, considering the low rank given to collision by these foreign Codes, the Judge proceeds: "But, however the relative rank of collision may be ultimately determined, I find nowhere in the general maritime law, any countenance to a priority of liens for mere *quasi* torts, such as negligence in the execution of contracts. The relative rank of such liens in the judgment of the general maritime law, is expressly determined by a great number of codes, from the ordinance of 1681, downward. It is mentioned in almost every modern code, and in every case has a lower rank than wages, bottomry or necessary supplies for the voyage. French Code de Com. art. 191, § 11; German Code, art. 772, § 4; Netherlands Code, § 313, subd. 10; Italian Code, § 674, subd. 11; and numerous others, including the Codes of Belgium, Spain, Portugal, the Argentine Republic, Egypt, Chili and Brazil, referred to by Desjardins in Droit Com. Mar., vol. 1, p. 292, §§ 156-158." and thereupon, Judge Brown concludes: "Where the tow is completely under the control and management of the tug, the case, as respects the point under consideration, is perfectly analogous to injury of cargo on board the guilty ship. The owners of the tow, in engaging towage, voluntarily put the tow in charge of the tug as completely as the cargo owner does his goods when he puts them on board. This implied security is the value of the vessel as she is, with no right to postpone prior lienors who are not guilty of laches or fault. The same rank in order of preference should therefore be assigned to in-

juries to the tow, as to injuries to goods on board the offending vessel, and this, as we have seen, is posterior to liens for supplies, where no laches exists." 30 Fed. Rep., 799 and 800.

See translations of the Codes of France, Italy, Belgium, the Netherlands, Germany, Spain and Norway in the Appendix.

Neither of the two cases denying the superiority of the repair and supply lien, contains any reference to this universal rule of the maritime law, nor makes any distinction between lien for collisions, pure and simple, and damage liens for negligent towage, nor recognizes the analogy of the latter with liens for cargo damage.

The *M. Vandercook*, regarding the claim for negligent towage as arising *ex delicto*, awards it priority over claims *ex contractu* without further discussion, upon the strength of an extract from *Abbott on Shipping* and a dictum in *Norwich Co. vs. Wright* in this Court, which we show hereafter (p. 42,) do not at all sustain the principle for which they are cited.

The *Daisy Day* follows the *M. Vandercook*, without citing any additional authorities on the question of preference, but with the modification, "that the question whether a claim is one in contract or for tort is by no means a sure test of priority," the decision destroys the very basis of the case it follows, which awarded the greater rank to the damage lien solely because it arose *ex delicto*.

The criticism made by our adversary in the court below, after a careful and searching examination, no doubt, of all of these maritime regulations of other commercial nations so ably collated by Judge Brown, was confined to the French Projet of 1867 and the Italian Code of 1882.

As to the former, the claim was it never became a law. But the French Code of Commerce, Sec. 191, (See Appendix) providing for privileged debts makes no mention whatever of liens for collision.

As to the Italian Code of 1882, it was claimed that by Section 661, personal injuries and death claims are privileged in case of insufficiency of the sum to be distributed.

This Section is in title 8, which refers to the subject of "collision" only, and regulates *among themselves* the privilege of several claims which arise out of the same collision. But that title does not relate to the general subject of privileges, which is specially treated in title 9. Section 666, under the latter title, declares that the privileges enumerated therein are preferred to every other privilege, general or special, and Section 674, in this title, defines these privileges, and gives the order of their rank, and while it puts damage to cargo in the eleventh rank and below necessaries, *it does not mention collision at all*, which is consequently accorded no preference. (See Appendix.)

Our adversary laid great emphasis in the courts below upon an extract from Chap. 18 of Consulat de la Mer, taken from the Black Book of the Admiralty, Twiss, Vol. 3, p. 83, which states that the managing owner of the ship ought to make good all loss the merchant may incur from his goods becoming damp, "*so far as the means of the managing owner will suffice*, and if they do not suffice the ship ought to be sold *without the part owners or the creditors having any preference.*" This does not declare that the merchant shall have any preference for his cargo damage, but only that he shall stand *upon the same footing* as the part owners and creditors, and then only after he has exhausted his remedy against the managing owner. What rank or priority shall be accorded to the merchant, part owners and creditors as a class among themselves, after the sale of the ship, does not appear.

By comparison with the following later provision of the Consulado, Black Book, (Twiss, Vol. 3, p. 245,) it would seem clear that what was intended by the words "without the part owners or the creditors having any preference" was that these persons had no right to object to the sale of the ship to pay the cargo damage.

"If a managing owner freights his ship to merchants for a lump sum or for so many quintals, and if the managing owner shall place or carry goods on the deck * * * if the goods which are placed on deck * * * are lost or spoilt * * * the merchants are not responsible. * * * But the managing owner of the ship is to replace and restore all these goods, which, for the above reason, have been

lost or spoilt, or the value of them, to the merchants to whom they shall belong. And if the managing owner of the ship has not wherewithal to pay, he ought to sell the ship, *which neither part owner, nor creditor nor anybody else can object to*, nor ought to dispute, for any reason saving the mariners for their wages."

A similar provision, [Twiss Black Book, Vol. 3, p. 465], where loss is sustained by the merchants to their goods, by reason of the vessel rendering a salvage service, concludes "the managing owner of the ship or vessel shall be responsible to them for all the loss which they have sustained through his fault. And if he shall not have wherewithal to indemnify them, then the ship or vessel ought to be sold, and no one can object in any way, saving always the claims of mariners for their wages."

Taking these several provisions *in pari materia*, it is absurd to claim that the first which is relied upon by our adversary, decides anything as to the *rank* of the cargo damage claim.

IV.

A lien arising ex delicto does not out-rank one arising ex contractu, as a mere matter of legal right, irrespective of other considerations.

Our adversary seeks to avoid the effect of these authorities placing his claim and ours in the same class, because both arise out of a voluntary relation with the vessel,—by insisting that damage by negligent towage constitutes a tort, and therefore, *eo ipso*, outranks a claim based upon contract. Granting that injury by negligent towage is considered a tort according to the authorities cited against us, (*The Quickstep*,9 Wall., 665, *The Brooklyn*, 2 Ben.,547, *The Deer*, 4 Id., 353), none of the cases, upon examination, sheds any light upon the contention that a claim *ex delicto* fastens a lien upon a vessel of greater virtue than a lien arising *ex contractu*. The comparative rank of these

liens was neither in question nor discussed in the cases mentioned, which turned solely upon the point that injury by negligent towage does not arise out of the contract to tow, "but the obligation of the steamboat not to commit the tort arose out of the principle, applicable in all cases of tort, *sic utere tuo ut non alienum loedus.*" (Mr. Justice Blatchford in the Brooklyn, 2 Ben., at p. 551.)

A careful examination of the treatises and authorities, has failed to disclose a single case giving precedence to a maritime lien solely and only because founded on a tort. Where such superiority has been recognized, the underlying principle has been, as far as we could discover, the relation of "*demerit or obligation*" of the prior maritime lien, whether based upon contract or tort, to the subsequent lien of damage. Vide the remarks of Mr. Justice Blatchford, in the *F. J. Fowler*, (172 Fed. Rep. 656), supra.

"Besides, the question whether the claim is one of contract or for tort is by no means a sure test of priority." Severens, J., in the *Daisy Day*, 40 Fed. Rep., at p. 640.

Further strength to the contention that a claim founded in tort gives no superior lien of itself, is derived from the following guarded language adopted by Mr. Justice Blatchford in the *R. S. Carter*, 40 Fed. Rep., 332, where he had before him for determination the comparative rank of claims of material men and damages for collision:

"Moreover, the question is not between a wages claim *nor between material men and a claim arising out of a quasi tort, where the cause of action is a neglect of some duty assumed in pursuance of a voluntary agreement between the parties.* The claim of Loud is for *damages caused by collision pure and simple*, committed by the R. S. Carter."

If this rule of superiority were applicable alike to all cases of tort, the explicit reservation made by the learned justice, in these words, would be meaningless, and it is more than ordinarily significant, as he had then, indirectly but clearly, brought before him in this *R. S. Carter* case, the very question invoked in the case at bar, the claim of Loud there for damages being the identical claim here, the R. S. Carter being also held responsible as the tug

having in tow the bark Doris Eckhoff, which collided with the schooner Flint in tow of the tug J. G. Stevens. (See the Record in this case, fol. 2, the R. S. Carter, 40 Fed. Rep., 331.)

That there is a distinct and essential difference, in the contemplation of law, between cases of tort, pure and simple and these cases *ex delicto quasi ex contractu* would also appear from the views of Mr Justice Daniel in the leading case in this Court of the *New Jersey Steam Nav. Co. vs. The Merchants Bank*, 6 How., 344.

True, the learned Justice dissented in the decision in the case referred to, but the following remarks from his opinion would still be pertinent in emphasizing the distinction we are seeking to make. The question involved in the case, was the jurisdiction of admiralty of a claim against a steamboat company, for the loss of specie carried in their boat by an express carrier, and lost by fire on Long Island Sound. To meet the objection to the jurisdiction deduced from the character of the contract of carriage, the libellant insisted that the foundation of the suit was a marine tort, which having been committed on Long Island Sound, and therefore not within the body of a county, was exempt from the objection (of the law as it then stood following the English rule) on the score of locality. Mr. Justice Daniel, in combatting this proposition that the claim was a pure tort, discussed the class of cases in which a plaintiff having a right of action arising on contract, might waive his remedy directly upon the contract in form, and allege the *gravamen* as originating in tort produced by a violation or neglect of duty. One of this class of cases, not necessary to refer to here to elucidate the distinction we are seeking to make clear, was in which independent of the plaintiff's rights arising from express stipulations with the defendant, there are duties incumbent upon the latter resulting from the peculiar position he occupied with respect to the public, giving the right to all who may suffer from the violation or neglect of their public obligations. "Second, they are cases" says Mr. Justice Daniel, 'in which a kind of *quasi tort* is supposed to arise from a violation of the contract between the parties. (An exact example is the case at bar). These cases, although they

are torts in form, are essentially cases of contract. The contract, therefore, must be referred to, and substantially shown to ascertain the right of the parties, and to measure the character and extent of the redress to either of them. It can in no material feature be departed from. This I take to be the *rationale* of the practice, and the view here taken appears to be sustained by authority." 6 Howard, 410-412.

Liens for tort therefore not being accorded a priority merely because grounded in the wrong of the vessel, what are the principles, aside from authority, which should prefer the material man's lien to the lien of Loud in the present case?

These considerations are well stated in the opinion of Judge Benedict in this case in the District Court: "The claims of Loud, (the appellant,) although in a certain sense *ex delicto*, arises out of neglect on the part of his employee in the performance of a contract voluntarily entered into by Loud. Loud selected a careless tug to tow the Flint, and suffered thereby. It was at his option what tug should be given the opportunity to injure the Flint. In the exercise of this option he selected a careless one, responsible, indeed, to him for any damage to the Flint caused by negligence, but given the opportunity to do damage to the Flint by the voluntary act of Loud. In this respect, the claims of Gladwish, Mequin & Co., (the appellees,) and Loud stand on the same ground." 58 Fed. Rep. at p. 793.

The same Judge had before him in the *Samuel J. Christian*, supra, two competing liens exactly the same as in the present case. He preferred the eailer lien of the material man in language which we have already quoted, and a part of which we repeat: "A different rule applied in the present case would give to McNab (the damage lienor) a security for his demand greater than the security upon which he entered. He would be paid out of the proceeds of the tug, discharged of the liens of the material men; whereas, when his contract was made, the tug was subject to those liens." 16 Fed. Rep., 798.

Judge Brown in the Young America, supra, preferred the earlier lien of the material man for similar reasons, among others, using the following language already quoted, supra: "The owners of the tow, in engaging tow-

age, voluntarily put the tow in charge of the tug as completely as the cargo owner does his goods when he puts them on board. This implied security is the value of the vessel as she is, with no right to postpone prior maritime lienors who are not guilty of laches or fault." 30 Fed. Rep., at p. 800.

A further discussion of the point in controversy, in this case, demands a consideration of the cognate question of the priority of the repair and supply lien over the collision lien, as whatever is to be found in the English cases pertains solely to the preference of liens for collision, no liens, as already stated, being allowed for damage to cargo or for negligent towage, and no liens for repairs or supplies except in a certain few special cases hereafter alluded to.

Before considering this question of priority, however, it seems proper to show the difference between the law of this country and of the other commercial nations, both ancient and modern, which recognize to the fullest extent the lien of the material man, and England which does not, and also make clear the comparatively recent origin of the collision lien both in this country and England as distinguished from other countries, which give no lien for collision whatever.

V.

The origin and nature of the lien for materials and supplies and the lien for collision, stated and compared.

A. The lien for materials and supplies.

The lien has been consistently recognized and enforced by this court as contradistinguished from the English courts, from the earliest to the most recent times.

The *General Smith*, 4 Wheaton (1819), 438, the first

leading case in this Court, which Mr. Justice Bradley stated in the *Lottowanna*, 21 Wall., 558, (1874) had then been adhered to for more than fifty years—held that where repairs had been made or necessaries furnished to a foreign ship, or a ship in the port of the State to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security, and he may well maintain a suit *in rem*, in the admiralty to enforce his right.

In the *St. Jago de Cuba*, 9 Wheaton, 409, (1824) Mr. Justice Johnson, speaking for this Court, gives the reason for the lien of the material man as follows: "The whole object of giving admiralty process and priority of payment to privileged creditors, is to furnish wind and legs" to the vessel "to get back for the benefit of all concerned; that is to complete her voyage." "The vessel must get on; this is the consideration which controls every other; and not only the vessel, but even the cargo, is *sub modo*, subjected to this necessity," 9 Wheaton, 416.

In Cunningham vs. Hall, 1 Clifford 43, (1858) Mr. Justice Clifford sitting at Circuit, gave expression to the same views as those of Mr. Justice Johnson that a lien was given by the maritime law for repairs and supplies furnished in a foreign port "for the plain reason that repairs and supplies in a foreign port *are no less essential than the services of the mariner* to furnish 'wings and legs' to the ship for the purpose of enabling her to complete the voyage for the benefit of all concerned."

In the case of *Thomas vs. Osborn*, 19 How., 22, Mr. Justice Curtis in 1856, delivering the judgment of this Court, referred to certain English cases decided as late as 1853 as settling definitely the law of England "that the master of a ship has not power to create a lien on the vessel as security for the payment for repairs and supplies obtained in a foreign port save by a bottomry bond; that he can only pledge his own credit and that of his owners, but cannot, by any act of his, give the creditor security on the vessel." "The decisions rest merely upon the want of authority in the master, according to the law of England, to create by his own act, an absolute hypothecation of the vessel as security for a loan. But the maritime law of the United States is settled otherwise—in

harmony with the ancient and general maritime law of the commercial world. The master of a vessel of the United States being in a foreign port, has power, in a case of necessity, to hypothecate the vessel, and also to bind himself and the owners, personally for repairs and supplies, and he does so without any express hypothecation, when in case of necessity, he obtains them on the credit of the vessel without a bottomry bond (citing authorities in this country.)" 19 How., 27-30.

Mr. Justice Curtis refers in his opinion in the case last cited, in support of the proposition that it not material whether the hypothecation is made directly to the furnisher of repairs, or to the one who lends money on the credit of the vessel, in a case of necessity to pay such furnisher, to a quotation by Valin: "Through all time by the use and custom of the seas, it has been allowable for the master to borrow money, on bottomry or otherwise, upon the hull and keel of the vessel, for repairs, provisions and other necessaries, to enable him to continue the voyage," (Com. on Art. 19, Ord. of 1681,) and further to the following ancient and more recent laws, treatises and commentators: The Roman law, *de exercitoria actione* D. 14, 1; *the Consulate del Mare*, ch 104, 105, 236; the Laws of Wisby, Art 13; the Laws of Oleron, Art. 1; Le Guidon, ch. 5, Art. 33; the French Ordinance of 1681, Art. 19; Emerigon's Con. a la Grope, ch. 4, sec. 11, Vol. II, p. 484; Kuricke, 765; Loccenius, lib. 3, ch. 7 n. 6; Stypannus 417, n. 107; Boulay Paty *Cours de Droit* Com., tit 1, sec. 2, Vol. I, p. 39, and tit. 4, sec. 14, Vol. I, pp. 151, 153; Pardessus *Droit Com.*, Vol. III, a. 631, 644, 660; and Pardessus Col., Vol. II, p. 225 note.

"*By the Civil Law*," says Mr. Justice Clifford, in *The Kalorama*, 10 Wall, 204. (1869.) "a lien upon the ship is given, without any express contract, to those who repair the vessel or furnish her with necessary supplies, *whether the vessel was at her home port or abroad* when the repairs and supplies were made or furnished (citing authorities)."

In the *St. Lawrence*, 1 Black, 522, (1861,) this Court had held however, following the General Smith, supra, that the principles of the civil law by which a lien is given in the case of a domestic vessel, formed no part of the gen-

eral maritime law, but were part of the local law of the countries which had adopted the civil law, and consequently were not part of the admiralty and maritime jurisdiction of the United States.

It is quite clear, however, that at a very early period in the history of the commerce of this country, credit to vessels in their home ports became as necessary "to furnish wind and legs" on the coming voyage, as in foreign ports to continue and complete the voyage.

As early as 1784, Pennsylvania passed a law allowing persons fitting out and furnishing vessels for a voyage to sue in admiralty as mariners sue for wages. (See *The Lottowanna*, 21 Wall, 558.)

The *General Smith*, supra, decided in 1819, denied a lien on a domestic vessel because the law of Maryland did not afford it.

Peyroux vs. Howard, 7 Peters, 324, decided in 1833, enforced a lien for labor and materials on a domestic vessel given by the law of Louisiana.

In 1844, when this Court promulgated the rules of practice in admiralty, the 12th rule expressly provided for the enforcement, in admiralty, of liens given by the local law on domestic vessels. In 1858, the rule was amended by forbidding proceedings in *in rem* in cases of domestic vessels, but in 1872, the rule was again restored as in force previous to 1858.

The current of authority in this court and the district courts, furnishes abundant instances of the enforcement of these statutory liens in admiralty, and in the very latest utterance by this Court (1892) on the subject, of a lien given by an Illinois statute on a domestic vessel, Mr. Justice Gray declared the following propositions, as established by the decisions of this Court, no longer doubtful:

1st. For necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, *following the civil law*, and may be enforced in admiralty.

2nd. For repairs or supplies in the home port of the

vessel, no lien exists, or can be enforced in admiralty, under the general law independently of local statute.

3rd. Whenever the statute of a state gives a lien, to be enforced by process *in rem* against the vessel, for repairs or supplies in her home port, this lien being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the Courts of the United States." The *J. E. Rumbell*, 148 U. S.

Recognizing, as this court will, the high privilege accorded from the very beginning by the admiralty courts of this country, to the lien of the material men following the broad and enlightened principles of the civil law, rather than the narrow view of the English courts which allowed no lien for repairs or supplies until recent times, and then only as to foreign vessels in English ports (3 & 4 Victoria, Ch. 65, § 6) and as to English vessels repaired in ports outside of Great Britain, Ireland and the Channel of Irelands, (19 & 20 Victoria, Ch., 97, § 8), it is noteworthy that the lien for collision is in many commercial countries not recognized at all, and in England and the United States has been doubted until the latter half of this century.

B. The lien for collision.

"Express mention of damage by collision is found in comparatively few of the modern codes. * * * Many of the maritime codes of Europe, like that of France, give no special privilege upon the ship for damages by collision. Redress is obtained by suit against the master and owner, who are held for the whole damage except upon a surrender of the value of the ship and freight, taking no aoccunt of any lien arising *ex contractu*. Valin Comm. L. 3, T. 7, Art. 10; Emerigon, 1, 418; 5 Desjardins Droit Com. Mar. 93" Brown, J., in the *Young America*, 30 Fed. Rep., 799, in which an exhaustive consideration of the ancient and modern authorities on damage liens and their rank will be found. (See also translation of foreign codes in Appendix.)

"And in the maritime codes of all the principal maritime couatries for more than 200 years at least, no lien or

privilege for pure torts, or for damages arising from collision, except as regards injuries to the ship's own cargo, involving a breach of her contractual relation, has ever been allowed, until within a recent period in England and this country, and in a few recent codes, which have allowed in collision cases a privilege of a very low rank." Brown, J., in *The City of Norwalk*, 55 Fed. Rep., 98, at p. 111.

Parsons in his treatise on Shipping and Admiralty (published in 1869) states the matter thus cautiously :

"By the later and better authority, it would seem that a collision gives to the suffering ship a lien on the ship causing the damage," and cites a case in this country [The Creole, Legal Intelligencer, May 7, 1852,] in which Judge Kane, [of the Eastern District of Pennsylvania] said that though *there was properly speaking no lien in collision, because the subject was tort*, yet the vessel would be liable even in the hands of a purchaser.

While there are cases in this Court (*The Brig Malek Adhel*, 2 How., 233, *The China*, 7 Wall, 68, *The Siren*, Id. 152, *Sherlock vs. Alling*, 3 Otto, 99) which take it for granted that collision creates a lien against the vessel in fault, the direct point was neither in issue nor decided in any of the cases, and as late as the year 1867 in the *Rock Island Bridge*, 6 Wall, 213, Mr. Justice Field had occasion to consider the English case of *The Volant*, 1 Wm. Rob. 388, in which Dr. Lushington is reported to have said that damage committed on the high seas conferred no lien upon the vessel, and the case of The *Bold Buccleugh*, 7 Moore, P. C. C., 284 holding the contrary view. It is significant that no cases in this country were cited by Mr. Justice Field or counsel; but the right to a lien was based upon the *Bold Buccleugh* as showing that what Dr. Lushington said was a mere dictum, if, indeed, he made use of the expression at all from a contemporaneous report of the same case (1 Notes of Cas. 508.)

The *Bold Buccleugh*, it is apparent, grants the lien upon no other consideration than that the lien and the proceeding *in rem* are correlative—where one exists, the other may be taken, and vice versa, and not otherwise, as will ap-

pear from the following extract from the decision, embodied by Mr. Justice Field in his opinion in the *Rock Island Bridge*, supra.

"A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right, inchoate from the moment the lien attaches, and whilst it must be admitted that when such lien exists a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, then a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process.

The conclusion that a maritime lien exists in every case "where a proceeding *in rem* is the proper course," seems far from satisfactory, for it leaves unanswered the question in what cases a proceeding *in rem* is the proper course. This English case can hardly be claimed as decisive and controlling in face of the maritime codes of nearly all the principal maritime nations denying any lien for collision. (See Appendix.)

Commenting upon the *Bold Buccleugh*, Judge Brown says in the City of Norwalk, supra: "The establishment of a lien in England for collision damages to property, apparently arose through a misinterpretation of the meaning of the ancient practice of the proceeding *in rem*, which as pointed out by President Jenne in *The Dictator* (1892) Prob. Div. 304, did not involve the existence of any lien or privilege on the ship, in the sense in which we now understand it, but was only a means of compelling an appearance, and included a special citation to the master, as in the continental practice. 2 Brown Civil L., 397, The Sloop Merchant, Abb. Adm. 5; Mar. Col. (2 Ed.) 78. Precisely how or when the practice arose of dropping the personal defendant in suits in the English admiralty, is not determinable; but it was during the long controversy between the admiralty and common law courts, and it was probably a mere device of the admiralty courts to avoid the persecution of prohibitions, which were not issued where no personal judgment was asked or rendered. Zouch Adm. 125." 55 Fed. Rep., 111.

According to *Clerke's Praxis*, the oldest authority upon the English Admiralty practice, a book written during the reign of Elizabeth, (of which an entire translation is given in Hall's Adm. Practice, Baltimore 1809)—the original warrant was *in personam* to the marshal to arrest and detain the defendant until he legally appeared (Hall, p. 3.) By Title 28, if the defendant concealed himself or absconded, but had "any goods, merchandise, ship or vessel upon the sea," and within the jurisdiction of the Lord High Admiral, a warrant issued to attach the goods or the ship and cite the defendant and all others having any right or title to the same, to appear and answer unto the libellant. (Hall, p. 60.)

The only instance mentioned in Clerke of a proceeding *in rem* as distinguished from a proceeding *in personam* coupled with an attachment, is in Title 41 entitled "The manner of arresting your own goods when they are detained, occupied or possessed by another" (Hall, p. 81.)

The bitter and protracted conflict between the common law and the admiralty judges in England, in regard to the admiralty jurisdiction, was at least in part due to the admiralty judges, administering a different system of jurisprudence by the same form of proceeding (*in personam*) as in actions at law.

In the resolution of the King's Council, subscribed Febuary 4, 1632, by all the judges of both benches, (Hall's Adm., XXIV), it was agreed that no prohibition should issue in *in personam* suits upon contracts made or other things personal done beyond seas, nor in actions upon charter parties, provided no penalty was demanded and no question existed as to whether the charter party had been made or not, or whether the plaintiff released or otherwise discharged the same within the realm. And in suits for building, amending, saving or necessary victualing of a ship, no prohibition was to issue, provided the suit was "against the ship itself, and not against any party by name, or such as for his interest makes himself a party."

It is notable that in this agreement no mention is made of jurisdiction for damage done by collision, whether in personam or in rem.

This agreement was afterwards disavowed and said to have been renounced by several of the Judges (Hall's Adm., XXVI); but the jurisdiction of the Admiralty Court was again settled, April 12, 1648, as appears from Scobell's Collection of the Acts and Ordinances of the Republican Government of England, anno. 1648, p. 147, by an Act of Parliament, as follows:

"The Lords and Commons assembled in Parliament, finding many inconveniences daily to arise in relation both to the trade of this Kingdom and the commerce with foreign parts through the uncertainty of jurisdiction in the trial of maritime causes, do ordain, and it be ordained by the authority of Parliament:

That the Court of Admiralty shall have cognizance and jurisdiction against the ship or vessel, with the tackle, apparel and furniture thereof, in all causes which concern repairing, victualing and furnishing provisions for the setting of such ships or vessels to sea; and in all cases of bottomry, and likewise in contracts made beyond the seas, concerning shipping or navigation, or damages happening thereon, or arising at sea in any voyage; and likewise, in all cases of charter parties or contracts for freight, bills of lading, mariners' wages or damages in goods laden on board ship, or other damages done by one ship or vessel to another; or by anchors or want of laying of buoys, except always that the said Court of Admiralty shall not hold pleas, or admit actions upon any bills of exchange or accounts betwixt merchant and merchant or their factors."

This appears to be the first sanction in English law or practice of a suit for collision damages *in rem*, not coupled with proceedings *in personam*, or any citation to a defendant by name.

The earliest reported collision case, in which proceedings were *in rem* is that of *Harbyn vs. Berry*, (The Thomas and John) reported in *Marsden's Admiralty Decisions*, *p.* 235, (1648).

The case appears to have come on to be heard, on the 8th of September, 1648, "*coram venerabilibus viris doctoribus Clerke et Exton Judicibus in Cenaculo Dominorum Advocatorum.*" The Clerke thus mentioned, is presumably Francis Clerke, the author of Clerke's Praxis.

The suit was brought by Thomas Barry and others, owners of the ship *Thomas*, and Nicholas Skinner and others, owners of goods on board, "*contra navem quondam vocatam The John*," and against the goods on board the John, and against "Holditch *et alios pro interesse suo in bonis in navi the John proedicta attachiatis*"—a libel *in rem* and in *personam;* although the novelty of this form of proceeding was apparently such that the entry of the title in the Act Book reads "*Berry, Skinner, et alli, contra Holditch et alios.*"

The antiquity, permanence and universality of the lien of the material man having been firmly established as we have shown, while the question of the damage lien as a settled and determined matter, in our admiralty jurisprudence, depending upon slender and precarious conditions, as we claim, the next inquiry, naturally suggested, is:

VI.

Shall the general maritime law in force among all the commercial nations of the world, except England, govern this Court in determining the comparative rank of the material men's lien and the collision lien?

The precedent is about to be established in this country for the first time; the results, it is conceded, will be far reaching; it cannot be denied that it is desirable that the rule of priority shall be harmonious, if possible, everywhere, in the interest of commerce and of that reciprocity among nations which this country has in recent times been so strongly advocating.

That we have a maritime law of our own has been ably and abundantly vindicated by the learned judges of this Court. (*Insurance Co. vs. Dunham*, 11 Wallace 1, *The Lottowanna*, 21 Id., 558.)

"This Court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but it is to be interpreted by a more enlarged view of its essential nature and objects, *and with reference to analogous jurisdictions in other countries constituting the maritime commercial world*, as well as to that of England." Bradley, J., in *Ins. Co. vs. Dunham*, supra.

The case last cited, shows the many instances in which this court has declined to follow the narrow and illiberal precedents of the English Courts, born of the constant conflicts between the common law and the admiralty judges, and has declared that the maritime jurisprudence of this country is founded upon the broader and more enlightened principles of the other commercial nations.

In *Delovio vs. Boit*, 2 Gall., 398, which this Court speaking through Mr. Justice Bradley in *Ins. Co. vs. Dunham*, 11 Wallace, 36, has declared "will always stand as a monument of his (Mr. Justice Story's) great erudition," there is probably a more exhaustive exposition of the admiralty and maritime jurisdiction of the United States than is to be found in any other case decided since 1815, when the opinion was penned. This immortal effort of the learned jurist, which repays frequent perusal by every admiralty lawyer seeking for the sources of our maritime law, renders needless the quotation of other authorities. A few extracts from the decision may not be amiss to impress upon this court our view that the English rule of priority of collision creditors which has been followed by the courts below, should not be adopted now.

Mr. Justice Story having examined the maritime regulations of all commercial countries from the remotest antiquity, as well as the jurisdiction of the English admiralty as limited by parliamentary enactments and the restrictions of the common law courts, and having construed the meaning of the words "admiralty" and "maritime" as used in the Constitution delegating to the judicial power cognizance "of all cases of admiralty and maritime jurisdiction," concludes in the following manner:

"The language of the Constitution will, therefore, warrant the most liberal interpretation; and it may not be unfit to hold that it had reference to that maritime jurisdiction which commercial convenience, public policy and national rights have contributed to establish, with slight local differences over all Europe; that jurisdiction, which, under the name of Consular Courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which, collecting the wisdom of the civil law, and combating it with the customs and usages of the sea, produced the venerable Consulato del Mare, and still continues in its decisions to regulate the commerce, the intercourse and the warfare of mankind. Zouch, ch. 1, p. 87, etc.; Selden ad. Fletam, cap. 8, s. 5; Rob. Collect. Marit., 105 note. Of this great system of maritime law, it may be truly said—'*Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes, et omni tempore, una lex, et sempiterna et immortalis, continebet.*' *Cic. Trag. de Repub., lib. 3 (editio Bost. 1817, tom 17, p. 186.)*" 2 Gall., 398.

We are aware that it will be argued that this court decided in the *Lottawanna*, supra, that the general maritime law is only operative in the United States so far as it is adopted by the laws and usages thereof, and that the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question, and that the decisions of this court are especially to be considered in determining what are these limits. Under these decisions, Mr. Justice Bradley, in the case cited, declared that the law as settled in this court in the General Smith, 4 Wheaton, 438, fifty years before, adverse to a lien for repairs to a vessel in her home port, must override the general maritime law. The case is, however, no authority whatever on the point involved here, for it is *res nova* in this Court, which is free to decide it unhampered by previous adjudications. Mr. Justice Bradley distinctly recognizes the universality of the general maritime law, as follows:

"Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case

on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed, as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things, wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations, (our own included) of the general maritime law as the basis and ground work of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence, and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries, are not one and the same in every particular; but that whilst there is a general correspondence between them arising from the facts that each adopts the essential principles, and the great mass of the general maritime law, as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption, it would not be law. And thus it happens that, from the general practice of commercial nations in making the same general law, the basis and ground work of their respective maritime systems, the great mass of maritime law, which is thus received by these nations in common, comes to be the common maritime law of the world." 21 Wall, at pp. 572 & 573.

VII.

Liens for materials and supplies take precedence of liens for collision.

The Young America, 30 Fed. Rep., 799
The Amos D. Carver, 35 Id., 665.

As we have already shown, under Point III, the lien for cargo damage, (which according to the decisions of this Court, bears the same relation to the vessel in fault, as liens for negligent towage) is postponed to liens for repairs and supplies, in almost all of the commercial nations of the world.

Liens for collision are not allowed by many of these nations, but where given, their rank is last in the whole order of privileges or liens against vessels.

By the French Code of Commerce, Sec. 191, (See Appendix) repairs are placed in the fifth rank, while liens for cargo damage are in the last rank and no lien for collision is given.

By the recent Italian Code of Commerce, Sec. 675, (See Appe.) necessaries are placed in the ninth rank, while liens for cargo damage are in the last rank, and no lien for collision is given.

By the Belgium Code of Commerce of August 21, 1879, Book 21, Title 1, Article 4, (See Appendix) repairs and supplies are placed in the ninth rank, and collision damage below it, in the next to the last rank.

The Netherland Code of Commerce, Book 2, Sec. 313, (See Appendix) gives supplies and repairs the sixth rank, while cargo damage occupies the lowest rank, and no lien for collision is recognized.

The German Code of Commerce, Book 5, Art, 772, (See Appendix) places repairs and supplies with bottomry in the third rank, while damage to cargo is given the fourth rank, and no lien for collision is provided.

By the Code of Commerce of Spain, Book 3, Title 1,

Art. 580, (See Appendix) repairs and supplies are placed in the eighth rank, while indemnity for goods lost or damaged is given the lowest rank, and lien for collision is not recognized.

The Maritime Law of Norway of July 20, 1893, (See Appendix) prefers bottomry claims to "compensation for damage caused through the fault or negligence of any person employed on board in the service of the ship" which latter, we presume, includes collision, for it is otherwise not mentioned.

The Maritime Law of Sweden of June 12th, 1891, follows in all respects the law of Norway on the subject.

A perusal of these different maritime codes leaves the indelible impression that the underlying principle pervading them all which permits a lien, is some benefit to the vessel charged with it. Indeed the very derivation of our word "lien" from the French "*lien*," "bond" "tie" and the Latin "*ligamen*," denotes a tying together of the claim with the vessel, a meaning entirely opposed to the situation caused by collision, or cargo damage, which manifestly, instead of tying the vessel to the claim created rather produces the opposite condition, namely, to render or tear asunder the vessel by diminishing her value to the extent of the claim.

It will be observed that the law of this country is in entire harmony with these continental regulations so far as they recognize liens or privileges for repairs, supplies, and those other claims which directly benefit or preserve the vessel, in contradistinction to the English rule which denies the lien.

We cannot better conclude our observations under this point than by referring to Desjardins, a Judge of the Court of Cassation, Paris, who, in his monumental work, *Traite de Droit Commercial Maritime*, (Book 1, Sec. 156, p. 291,) in criticizing Emerigon, who complained that the French Code of Commerce should have granted a better rank to the damage claim of the merchant freighters, tersely asks, "*Why should the merchant freighters have a preference! They have neither*

realized or preserved the common pledge." Here is the key to the whole situation.

This fundamental idea has guided this court in according the lien to the material man; and the same reason should incline the court in following these other great commercial countries in their conclusion that this beneficial lien outranks the lien for collision or damage, neither of which preserve or benefit the vessel.

VIII.

The authorities which, it is claimed, give collision and damage liens a rank superior to antecedent repair and supply liens, examined.

The leading case in this country affirming the priority of collision liens (and the decision is carefully confined to these), is the case of the *R. S. Carter*, 40 Fed. Rep., 331, decided by Mr. Justice Blatchford in the Second Circuit, in 1889. The learned Justice, referring to the difference of opinion on the subject between the judges of the two district courts in the circuit, (Judge Benedict, in the Eastern District, *The R. S. Carter*, 38 Fed. Rep., 515, and Judge Brown, in the Southern District in the *Amos D. Carver*, 35 Id., 665,) and the importance of establishing a rule of uniformity in these courts, cites the English and American adjudications up to the time of the decision, on the point in conflict and without examining the question upon principle or irrespective of these authorities, or analyzing the latter, simply concludes that the reasons assigned by Judge Benedict for the priority of the collision lien, seem to him more sound than the opposite views. We dwell especially upon this strange absence of independent expression of this learned admiralty Judge, upon the very important question before him, for the reason that we respectfully, but confidently insist, in the first place, that the authorities presented in his opinion, do not, upon examina-

tion, support his conclusion, and further, that this conclusion is irreconcilable with the rule of priority laid down by him in cases of successive torts, in his previous decision in 1883, in the *Frank J. Fowler*, 21 Blatchf., 470, 17 Fed. Rep., 653.

The two cases first referred to by Mr. Justice Blatchford, *The Pride of the Ocean*, decided by Judge Benedict, in the Eastern District of New York, in June, 1880, 3 Fed. Rep., 162, and the English case of *The Aline*, decided by Dr. Lushington in 1839, 1 W. Rob., 111,—may be considered together as they are based upon the same reasons in preferring a collision lien over a bottomry loan for the same voyage.

In the earlier case of *The Aline*, Dr. Lushington, after giving his opinion that the *mortgagee and the bottomry bondholder* could not take any right greater than the vessel could confer, namely, a lien on her as security against the owner and all who claimed under him, states the principal ground of priority in the following language:

"Another reason that would incline the preponderance in favor of the person suffering the damage arises from the consideration that he has no option, no caution to exercise; the creditor on mortgage or bottomry has. He may consider all the possible risks, and advance his money or not, as he may think most advisable for his own interest. He has an alternative, the suitor in a cause of damage has none."

Upon the ground last stated, Judge Benedict in the Pride of the Ocean, supra, rested the preference of the collision lien, "that a lender of money upon bottomry is a voluntary creditor, who, for the advantage to be derived therefrom, and with knowledge of the risks attending the voyage, deliberately enters into a contract with the ship, and moreover, is permitted to obtain compensation for the risk assumed by exacting a maritime premium, while the relation to the ship of him whose demand arises out of a collision is involuntary. It is created by circumstances over which the creditor in damage has no control and he can receive no compensation for the risk." 3 Fed. Rep., 167.

In considering the weight of *The Aline* as an authority, it must be borne in mind that the views above given. of Dr. Lushington were merely *obiter*. The only question presented for decision in that case, was the rank of a collision lien with respect to a bottomry bond for repairs made to the offending vessel *subsequent* to the collision, and it was held that the damage lienor was entitled to the value of the ship prior to the repairs. Judge Brown in the *Young America*, supra., in considering the case said: "In the course of the decision, some observations were made *obiter*, as respects the relation of a prior mortgagee or bottomry bondholder to the owner of another vessel acquiring a lien for a subsequent collision. These remarks are no doubt valuable, as suggestions from so high an authority; but they do not have the weight of an adjudication, since that question was not before the Court. It was not a subject of argument or of review, and has in fact never been adjudicated, so far as I can ascertain, in the English Courts." 30 Fed. Rep., 796.

Grant, however, that the views of Dr. Lushington are pertinent to the point in question, we submit that whatever rank might be accorded to a bottomry holder, or mortgagee, in England (and Dr. Lushington places these upon the same footing) where no lien for repairs or supplies is recognized by law, when opposed by a subsequent damage lien for collision, the current of authority in this country according the beneficial lien of the material man, is contrary to the views of Dr. Lushington, which would thus so easily and completely destroy it.

The fundamental principle of granting of a lien is to give legs and wind to the vessel, to speedily relieve her necessities, so that she may resume her voyage interrupted by need of repairs or supplies in a foreign port consequent upon mishaps or injury. "The vessel must get on; this is the consideration which controls every other; and not only the vessel, but even the cargo is *sub modo* subjected to this necessity." *The St. Jago de Cuba*, 9 Wheaton, 416.

The suggestion that the material man exercises an option necessarily involves an examination by him into the capacity and ability of the master and crew to so navigate and manage the vessel repaired or supplied, as not likely

to injure other vessels or persons, or commit the countless acts of negligence which confer a lien upon the offending vessel; the exercise of the option further necessarily implies the ability to ascertain this needed information in a foreign port, where the master and crew are strangers and the opportunities for inquiry are few, if any. Are the necessities of the vessel and the interests of commerce dependent upon them, to wait until in every instance, the material man becomes satisfied to assume the possible risks which the navigation of the vessel may subject his claim to? If it is once held that the material man is in danger of completely losing his claim by torts committed the moment the vessel starts on her voyage, or even while in port immediately after the accruing of the liens, then a condition will arise which may paralyze commerce, for vessels will be unable to obtain needed succor and assistance by the refusal of ship wrights and suppliers to take the enormous risks involved. Such a condition is repellant to the very aim and purpose of the lien; and the situation would be similar to that pictured by Mr. Justice Clifford in the *Kalorama*, supra, in case no repairs or supplies could be furnished upon the credit of a vessel in a foreign port, if her owner were present:

"Were it not so, mariners would refuse to ship for distant ports if the owner was to remain with the ship, either as supercargo or passenger, unless it was known he had credit everywhere, as in case the ship should become disabled and need repairs and provisions, the most reliable means of relief would be withdrawn; and it is not difficult to imagine a case where life and property might be lost, because the owner was on board and without personal credit." 10 Wall, 218.

The lien of the material man is entirely unlike the bottomry holder referred to by Judge Benedict in *The Pride of the Ocean*, supra, who "with knowledge of the risks attending the voyage, deliberately enters into a contract with the ship, and moreover, is permitted to obtain compensation for the risk assumed by exacting a maritime premium."

Dr. Lushington expressed the same view in the *Aline*, supra: "In the case of the bottomry creditor, moreover,

the risk that is incurred of losing his security is covered by the amount of premium he is entitled to demand." (1 Wm. Robinson, p. 118, bottom.)

The bottomry holder by the very terms of his contract, loses his claim, if the vessel does not reach her final port of destination, while the material man can follow the vessel to any port to enforce his claim; the bottomry creditor gets a maritime premium for the risk, but we have yet to learn that any Court has allowed recovery for more than the reasonable and market value of repairs or supplies to a vessel upon the theory that the furnisher had a right to make an increased charge for the risk of his claim being lost or extinguished by subsequent claims for torts of the vessel.

In another important aspect, the lien of the material man differs from that of the bottomry holder, when considered with reference to the collision lien. The maritime premium allowed to the bottomry lender for the risk incurred, furnished a fund from which the risk can and almost universally is covered by marine insurance, embracing not only the ordinary perils of the sea but, in modern times, the liability of the vessel for damage to other vessels by collision and otherwise. But the material man cannot conveniently secure himself in this wise owing to the many liens varying in amount, he obtains against different vessels, the uncertainty as to the length of credit, depending not on one voyage, but on several when extensive repairs or supplies are required, and finally and most controlling, that the prices obtained, in competition in open market, do not manifestly include the high premium demanded by underwriters for insurance, which embraces the ordinary perils of the sea, as well as the liability of the vessel repaired or supplied for negligent damage to other vessels.

But, conceding the extreme position of our opponents, that the material man can equally with the bottomry holder insure against the expected casualities, Judge Brown in the *Young America* and *Amos D. Carver*, supra, has clearly demonstrated that the conflict is rarely between the bottomry holder and the damage claimant, but the insurers of both.

"The suggestion that the bottomry lender may cover his risk by the premium exacted seems to me insufficient. He may, indeed, by special contract, insure the vessel, even against a liability for negligent damage to another vessel; but this only puts him, in this respect, on a presumptive equality with the owner of the vessel injured; since all vessels are usually insured against perils of the sea, which include collision by the fault of others. So universal is the practice of maritime insurance that looking for a general rule in the administration of justice, all vessels may be regarded as insured against damage by collision owing to the negligence of others. Practically, therefore, the question is reduced to a question between the bottomry creditor on one vessel and the insurers of the other vessel. In this aspect, the relation of each to the collision is equally voluntary; for the insurer of the ship injured receives his premium constructively, in contemplation of the precise collision that occurs. He has assumed that risk, and been paid for so doing. As between such insurers and the bottomry creditor, or the insurers of the bottomry creditor, who are usually the real parties in interest in the litigation, I see no reason why the bottomry lien should be postponed. The one prior in time being without laches or fault, and not benefited by the subsequent lienor, is entitled to his prior right." *The Young America*, 30 Fed. Rep., at pp. 798 & 799.

"The controversy in the great majority of cases is practically with the insurer, (as it is mainly in this case), who, having in the first instance paid the loss, in effect, out of the fund created by the premiums advanced by all ships insured, seeks to recover indemnity from the offending ship. The insurer does indeed have the benefit of the injured party's lien. But to subordinate prior lienors for wages, bottomry, and supplies to the collision lien would be practically and in effect to treat those lienors as co-proprietors, *pro tanto*, in the offending ship, and responsible for its navigation; or as reinsurers *pro tanto* of the underwriters upon the vessel and cargo insured, a relation as far as possible removed from the equitable relation of the parties. If the lienors may insure, so may the owners of the injured ship and cargo, as they usually do. They stand equal in this respect, and the superior equitable right of the prior contract lienors stands unaffected." *The Amos D. Carver*, 35 Fed. Rep., at pp. 668 & 669.

The next case cited by Mr. Justice Blatchford is the *M. Vandercook*, 24 Fed. Rep., 472, in which, he states, Judge

Nixon, in the District Coart for New Jersey, "held that it was the settled doctrine of the American as well as of the English admiralty, that the claim *ex delicto* should be paid in preference to a claim for prior repairs and supplies." A reference to the report of the decision in the *M. Vandercook*, discloses that the only citations by the court in support of the alleged "settled doctrine" above stated, is an extract from *Abbott on Shipping* and a sentence from the opinion of Mr. Justice Bradley in *Norwich Co. vs. Wright*, 13 Wall, 122, both also reproduced in the opinion of Mr. Justice Blatchford in the Carter case, (40 Fed. Rep., at p. 335 and p. 336,) and hereafter shown not to support the principle to which they are appended.

Mr. Justice Blatchford next refers without comment to the contrary views of Judge Brown in the *Amos D. Carver*, supra, and then reproduces the reasons of Judge Benedict (in the opinion in the case he is reviewing) for postponing the lien of the material man (40 Fed. Rep., at p. 334). These grounds, in brief, are three: First, that the material man for a consideration in the price he charged, voluntarily assumed the risk of a total loss of his lien by the sinking of the ship, and therefore, second, the creation of a lien upon the ship he repaired, arising from a collision, should be held to be included in the risk, and lastly, that the material man who gives time becoms a party to the employment of the vessel in the course of which the accident occurred, since he has a beneficial interest in that employment (40 Fed. Rep., at p. 334).

The ground that the material man includes in the price he charges a consideration for the risk of the total loss of his lien by the sinking of the ship, and therefore, also, the equal risk of being supplanted by a lien for damage by negligent navigation, is so opposed to probability, that we respectfully submit it should be disregarded. Because ships were made to plough the seas and their destiny is ultimately to go down, and all claims alike be lost, is it fair to assume, in the absence of all proof, and contrary to common experience, that shipwrights and furnishers relieving the necessities of the ship, in-

clude in the price charged a consideration for the risk of the total loss of their claims? It is not more likely that the parties comtemplate the reverse of this expectation, for what consideration, however exorbitant it was made, could upon the doctrine of average, cover the risk of total loss? What would be the basis of calculation? Should the enhanced price over the real value of the repairs include sufficient to cover the entire destruction of the ship or her partial injury, or again, the possible great or small damage to other vessels by negligent navigation? Are Courts seeking to declare a fair and equitable rule for the ranking of claims *inter sese*, to wander into these realms of speculation, and declare principles founded upon abstract theories instead of the practical and probable intentions of the persons concerned?

The final ground given by Judge Benedict for postponing the material man, is, as above stated, that by giving time, he becomes a party to the employment of the ship in the course of which the accident occurred, since he has a beneficial interest in that employment. This ground, we submit, is equally as untenable as the others given by the learned Judge.

That the material man, by affording needed repairs upon credit to a vessel in distress, shall thereby be constituted a party to her future employment, implies *ex necessitate*, that he has the right to have voice in that employment, to determine upon what voyage the vessel shall embark, and the likelihood of the master and mariners on board to injure the vessel, or by negligent navigation, do damage to other vessels, imposing a charge upon her. What is the legal relation of the material man to the vessel in this situation? Is he a part owner, or a mortgagee out of possession?

Does he by giving credit, in legal contemplation, become charged with the vessel's employment, sending her out to do possible damage to other vessels and consequently bound by her faults? Surely, if this is law, it is the exact opposite of what shipwrights understand their rights and duties accorded to them in this country from the earliest times.

The extract from *Abbott on Shipping* (11 Ed., 621) is stated by Mr. Justice Blatchford in the Carter case (40 Fed. Rep., 335) as the rule in England, that the maritime lien of damage, originating in the wrong of the master and crew of the vessel in fault, takes precedence of liens *ex contractu*, and absorbs in the event of the *res* proving insufficient to meet all demands, the liens of wages, towage, pilotage and bottomry. The author cites as authorities in support of the rule, the English case of *The Benares*, 7 Supp. Notes, Cas. Adm. & Ecc., 54, and *The Linda Flor*, Swab., 309, and reported also in 6 Wkly. Rep., 197, both being decisions of Dr. Lushington.

In the same work (Abbott on Shipping, 11 Ed., p. 633,) it is admitted that "*the priority of the lien for damage over liens ex contractu is not expressly declared in any of the foreign maritime codes, or discussed by the commentators upon them,*" and then follows the statement "but it seems to result from the unqualified terms in which the liability of the owner of the wrong doing vessel to the extent of the value of it, is everywhere laid down."

Judge Choate in the case of *The Orient*, 10 Ben., 620, remarked that the last mentioned statement went far beyond any decided case. Dr. Lushington, in the cases before him, adopted no such rule of preference as a question of mere legal rank, for no question of priority was involved in these cases, but only seamen's wages were postponed solely upon the doctrine of the marshalling of assets, the foreign seamen having two funds, namely, the vessel and the foreign owners who were solvent, while the damage lienor in England was confined to the proceeds of the vessel alone.

Judge Brown in the *Young America* supra, in approving the criticism of his predecessor in the *Orient*, supra, says:

"In a more recent case (1883) the English Court of Appeal has distinctly confirmed the view taken by Judge Choate in respect to the grounds of Dr. Lushington's decisions (*The Elin*, 8 Prob. Div. 39, 129), where, in adhering to Dr. Lushington's rule as respects the wages of sea-

men as against the proceeds of a *foreign ship* held for collision, the Court says:

'It has been argued that these cases have been wrongly decided, because they break through the rule of the Admiralty Court in regard to priorities of maritime liens. But the Linda Flor *was decided on principles quite independent of the rule as to priorities*, which was one well understood by Dr. Lushington, and which in deciding the case I have mentioned, he never intended to break through * * * He did not allow the fund to be diminished, by a payment of wages. "This he did, says the Court, independent of any mere question of priorities" (30 Fed. Rep., at p. 795.)

The cases of *The Linda Flor* and *The Elin* supra, were both instances where the maritime lien arising out of damage done by a *foreign* vessel took precedence of the lien for wages of the foreign seamen on board the vessel at the time of the collision. This priority has not been generally followed in like cases of wages in this country. *The Orient*, 10 Ben., 620, *The Samuel J. Christian*, 16 Fed. Rep., 797, *The Daisy Day*, 40 Id., 538.

The quotation from *Mach. Shipp.* (2 Ed.) 653, appearing in the Carter case (40 Fed. Rep. at p. 336) cites as the only authority the *Benares*, supra, in which, no question of priority was involved. There the only point was whether under the English statute of limited liability requiring the owner to bring into Court the "value of the ship and the freight," the statute meant gross freight, or whether the owner could deduct therefrom seamen's wages, etc. Dr. Lushington construed the statute as forbidding any such deduction (7 Supp. Notes, Cases 54.)

The only other citation given by Mr. Justice Blatchford in the Carter case is a sentence from the opinion of Mr. Justice Bradley in *Norwich Co. vs. Wright*, 13 Wall, 122, that "Liens for reparation for wrong done, are superior to any prior liens for money borrowed, wages, pilotage, etc."

Upon consulting the report of the case, it appears that this sentence is followed by the words, "But they stand on an equality with regard to each other if they arise from the same cause," with a reference to *Maclachlan on Shipp.*, 598.

But upon a further perusal of what immediately follows, in the opinion, it is shown clearly by these words of Mr. Justice Bradley: "We think therefore, that the lien of the libellants for the loss of the schooner and her cargo, arising from the collision *is on an equality* with the lien for the loss of the cargo of the steamer from the same cause"—that the learned Justice employed the reference to *Maclachlan on Shipping* solely to enforce the conclusion that the two liens in the case before him of the owners of a schooner and cargo sunk, in collision with a steamer, which also sank, and the lien of the cargo owner on the latter, *stood on an equality*. No question of priority was involved in the case, or necessary to its decision, and it is only by a most strained construction that the fragment reproduced in the Carter case can be held to reflect the opinion of this Court or Mr. Justice Bradley. The extract referred to, has been held to be a mere dictum in the *Samuel J. Christian*, 16 Fed. Rep., 797, by Judge Benedict, and in the *Young America*, 30 Id., 794, by Judge Brown.

Having thus disclosed by an examination of the authorities cited by Mr. Justice Blatchford, in the Carter case, the absence of a single case in point, determining as a matter of legal rank the priority of the collision lien over the antecedent lien for materials or supplies, it remains but to notice the case of *F. J. Fowler* decided by the learned Justice in 1883, (17 Fed. Rep., 653,) which we submit is inconsistent with his later decision in the R. S. Carter, although he distinguishes the same in the latter case.

Mr. Justice Blatchford, in the Fowler case, reversed the decision of the District Court, reported in 8 Fed. Rep., 331.

There, the competing claims, as appears from the statement of facts prefacing the opinion in the Circuit Court, (17 Fed. Rep., at p. 656,) were for *quasi* torts of the same character, each being for damages caused by the negligence of a tug towards her tow. There was an interval of nineteen days between the accruing of the earlier and the later claims. (See opinion in the District Court, 8 Fed. Rep., at p. 332.)

Judge Choate, in the Court below, in postponing the earlier lien, distinctly held that the delay of nineteen days in enforcing the claim could not be regarded as laches under the authorities, but based his decision upon the conclusion that a "lien or tacit hypothecation" is vested in the earlier damage claimant, and he is "to that extent in the position of an owner,—he has a *quasi* proprietary interest in the vessel. It is true he cannot, as an owner, control her employment or prevent her departure on another voyage, except by the exercise of his right or power to arrest her for the injury to himself, and in some cases the second injury may be done before he has an opportunity to arrest her."

In support of this conclusion, Judge Choate, cited the English cases of *The Aline*, 1 Wm. Rob., 111, and the *Bold Buccleugh*, 7 Moore, P. C., 284, quoting the extract from the *Aline*, which we have also reproduced (p. 34) and the following comment of the Court in the *Bold Buccleugh*, upon the *Aline*:

"In that case there was a bottomry bond before and after the collision, and the Court held that the claim for damage in a proceeding *in rem* must be preferred to the first bondholder, but was not entitled against the second bondholder, to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim.

(It may be noted, parenthetically, that the Privy Counsel fell in error in its conclusion as to what was held in *The Aline*, as in that case, there was *no bottomry bond before the collision*, but only one for repairs made *after* the collision, as a careful perusal of the case will disclose.)

The principle of these two cases Judge Choate held was also applicable to a prior lienholder, "who, by the tort of the master and mariners, has become, so to speak, a part owner in the vessel" (Id. at p. 339,) and who "clearly took the chances of her incurring new liabilities, according to

the principles of maritime law, and in a sense, may be said to have consented to her being employed in another towage service, out of which they (he) must be held to have understood that such a claim for damage might grow" (Id. at p. 340).

In reversing the decree which awarded the preference to the latest lien, upon the grounds and the strength of the two English cases before mentioned, Mr. Justice Blatchford gave his reasons for preferring the elder lienor in the remarks which we have incorporated in pages 7 and 8 of this brief, and concluded (17 Fed. Rep., 656):

"There is no principle of the maritime law, *and no interest of commerce or navigation, which requires that the elder lienor not guilty of laches, and not having committed any waiver or abandonment, should have his claim postponed to that of the younger lienor."*

We contend that the very same reasons advanced by Judge Choate in the District Court in the Fowler case, postponing the earlier lien of damage, are now urged by our opponent to postpone the prior lien of the material men, and the situation and the circumstances of this case, and the Fowler case are alike in this repect.

It is upon this analogy that the District Court of the Southern district held the Fowler case *stare decisis* in the *Young America* 30 Fed. Rep., 789, 798, and awarded to the earlier supply lien a priority over the later damage lien. See also *The Amos D. Carver*, 35 Id., 665, *The Gratitude*, 42 Id., 299.

It is true that Judge Blatchford in the Carter case (p. 335,) seeks to distinguish the Fowler case as one in which both claims were of the same character, each arising out of negligence on the part of a tug in fulfilling a contract of towage, but with all due respect to his views, we have after long reflection been unable to understand the distinction.

If a lien is a *jus in re* giving an interest in the vessel, as we have sought to show, then it seems to us that every consideration which gives the earlier lien for damage, a priority applies with greater force to an earlier lien for re-

pairs and supplies. The later lien for damage is of no benefit to the prior liens, for it does not increase the value of the vessel, while the policy of the maritime law has ever been to afford a vessel a ready means to supply her needs for the coming voyage by giving the material man security by a lien on the ship. If these liens are to be subject to every claim for damage arising during the voyage, the furnisher will surely refuse to give his goods to fit out the ship, and the entire system of credit to vessels for materials and supplies will be uprooted with the result that if vessels can get their fittings and equipment for the voyage only by paying cash, they will rot by the wharves.

The situation cannot be better summed up than in the words of Judge Brown, who speaks thus of these damage claims.

> If liens for all these causes are held to out-rank, as a matter of law, liens for seamen's wages, bottomry and necessary supplies previously furnished for the same voyage, it will constitute a revolution in the ranking of liens as hitherto understood, and as practiced by all maritime nations, and it will often result practically in sweeping away entirely those liens which have hitherto been deemed most meritorious, and essential to the protection of commerce." (30 Fed. Rep., at pp. 794 and 795.)

IX.

The question certified by the Circuit Court of Appeals should be answered in the negative.

J. H. LICHLITER,
Proctor for Appellee.

MARK ASH,
Of Counsel.

APPENDIX.

Containing extracts from the maritime codes of the principal continental countries on the subject of the rank of maritime liens.

I.

French Code of Commerce,*

(Passed September 10th, 1807.)

Book II.—Title I.

"*Article 190.*—Ships and other vessels are personal property.

Nevertheless, they are liable for the debts of the vendor, and especially for those which the law declares to be privileged.

Article 191.—Privileged debts are the following, and are classed in the following order:

1st. Judicial costs and other charges incurred in obtaining a sale of the vessel, and in the distribution of the proceeds thereof.

2nd. The charge for pilotage, tonnage, anchorage, lashing, basin or outer basin.

3rd. The wages of the keeper, and the expenses of watching the vessel from the time of her entrance into port till the sale.

4th. The storage of her rigging, and appurtenances.

5th. The expenses of repairing the vessel, rigging and appurtenances, since her entrance into port from her last voyage.

6th. The wages and pay of the captain and crew employed in the last voyage.

7th. The sums advanced to the captain for the necessary

* From the translation of Leopold Goirand, 1880, London: Stevens & Sons.

expenses of the vessel during the last voyage, and the reimbursement of the price of the goods sold by him for the same purpose.

8th. The sums due to the vendor, tradesmen, and workmen employed in the building of the vessel, if she has not yet made a voyage, and those due to creditors for provisions, work, labour, and for refitting, victualling, outfit and equipment, before the departure of the vessel, if she has already made a voyage.

9th. The sums lent on bottomry, for repairing, victualling, outfit and equipment, before the departure of the vessel. (Repealed by the Law of 10th Dec., 1874.)

10th. The amount of the premiums of insurance effected on the hull, rigging, appurtenances, outfit and equipment of the vessel for her last voyage.

11th. The indemnity due to the freighters for not delivering the goods laden on board, or for the damage which the goods may have sustained through the fault of the captain or crew.

The creditors comprised in each Section of this Article, shall have a concurrent lien on the vessel for the amount of their demands; and in case of insufficiency, the price of the vessel shall be divided equally among them in proportion to the amount due to each. Parties having claims guaranteed by mortgage upon the ship, shall be paid in the order of registration of such mortgages, but not before payment of those claims which the law declares by this same Article to be privileged debts.

II.

The Code of Commerce of Italy,

Approved in 1882.

BOOK II, TITLE IX, CHAP. IV.

674. Vessels and shares therein are bound even in the hands of third parties for the payment of debts which the

law declares privileged in the manner and within the limits established hereafter.

675. The following are privileged on vessels and are placed on the proceeds thereof, in the rank in which they are described in this section :

1st. Costs in proceedings taken in Court in the common interest of creditors for provisional remedies or execution on the vessel.

2nd. The expenses, the indemnities and the awards for salvage due during the last voyage according to the provisions of the mercantile marine courts.

3rd. The navigation taxes established by law.

4th. The dues to pilot, the dues to watchman and the expenses for watching the vessel after entering into port.

5th. The rent for stores of deposit of the apparel and tackle of the vessel.

6th. The expense for the keeping of the vessel and of its tackle and apparel after its last voyage and entry into port.

7th. The salaries, the emuloments and the indemnities due, according to the provisions of title 3rd of this book to the master and the other persons of the crew for the last voyage, as well as the dues to the Homes for Invalids of the Mercantile Marine for the same voyage.

8th. The amounts due for contribution and general average.

9th. The amounts due for capital and interest on obligations contracted by the master for the necessaries of the vessel in the cases referred to in Sec. 509 and in accordance with the formalities prescribed therein.

10th. The premiums of insurance on the vessel and of its accessories for the last voyage whether the vessel is insured by the voyage or for a stated period, and for steamers running at certain periods and insured at a stated period, the premium corresponding to the last six months; moreover in mutual insurance associations, the partitions or contributions for the last six months.

11th. The indemnity due to charterer for omission to deliver the goods shipped, or for damage done to the same

through the fault of the master or of the crew during the last voyage.

12th. The purchase price of the vessel still due to the vendor.

13th. The claims described No. 9, transcribed and recorded late; every other claim on the vessel given by bottomry and the claims for which the vessel shall have given pledge.

In case of several claims ranking together and mentioned in No. 13, the preference is determined by the date of the transcription of the title and of the record on the ship's paper.

III.

The Code of Commerce of Belgium.

Law of August 21, 1879.

Book II, Liber I, Maritime Commerce.

Article 4. Are preferred (granted to a privilege) in the order in which they are ranked, the hereinafter described claims:

1st. The judicial costs and others necessary to make the sale and the distribution of proceeds.

2d. The duties of navigation established in conformity with the law and the towage expenses.

3rd. The salary of the watchman and of the watching of the vessel from her entry in port to the day of sale.

4th. The rent for the stores where the riggings and apparatus are deposited.

5th. The expenses of preservation of the vessel and of her rigging and apparatus, since her entry into port.

6th. The expenses and indemnities due on the occasion of the salvage or the maritime assistance for the last voyage.

7th. The rents and salaries of the captain and the crew

employed since the opening of the last roll of the crew whatever be the mode of remuneration of their services.

8th. The sum loaned to the captain for the needs of the vessel during the last voyage, and the reimbursement of the price of goods sold for the same purpose.

9th. The sums due to the creditors for supplies, operations, labor for refitting, victuals, equipment and fitting, prior to the departure of the vessel if she has already navigated.

10th. The sums due to the suppliers and workingmen employed in the building, if the vessel has not yet made any voyage.

When the suppliers and workingmen have known that the building of the vessel had been contracted by a contractor for a third party, the privilege exists only so far as the latter is debtor to the contractor, at the time when the action is brought.

11th. The sum advanced for the building of a vessel by the one for whom the vessel is built, if the vessel is not yet delivered to him.

12th. The amount of premium of insurance effected upon the hull, the keel, the rigging, tackle, fitting and equipment due for the last voyage when the insurance is contracted in the course of the voyage, or for the last year when the insurance is made per year.

13th. The damages due to the charterer or freighter for default in delivery of the goods they have loaded, or for reimbursement of the average suffered by the said goods by the fault of the captain or crew.

14th. The damages due for cause of collision.

15th. The sums due to the vendor of the vessel for his price.

The creditors comprised in each of the numbers of the present article are to participate on the same footing *pro rata* in case of insufficiency of the proceeds.

IV.

The Code of the Netherlands.*

BOOK II.

Rights and Obligations Resulting From Navigation.

TITLE I. VESSELS.

Article 313. The preferred claims which in the case of the preceding Article, may be recovered upon the proceeds of sale of the vessel, are determined as follows:

They are privileged in the following order:

1st. The salaries of assistance, salvage and pilotage.

2d. The duties of tonnage, lighthouse, signals, quarantine, and other port expenses.

3d. The salary of the watchmen and other necessary workingmen for the custody of the vessel.

4th. The rent of the stores for the deposit of the rigging and equipments.

5th. The salary of the captain and crew.

6th. The supply of sails, cords and other necessary articles, and the expenses of repairs and preservation of the vessel and of her rigging and equipment.

The sums advanced or loaned to the captain or paid for his account, for the service and the needs of the vessel, as well as the sums due in indemnity of the goods sold by him to pay the above mentioned debts and the bottomry loans for paying off these debts wholly or in part, including the premium of the bottomry loan.

All the debts mentioned in Nos. 1, 2, 5 and 6 are privileged in so far only as they have been made on account of the last voyage, to wit:

Those mentioned in Nos. 1 and 2 and in the last paragraph of No. 6, if they were made during the last voyage.

Those mentioned in No. 5 and in the first paragraph of

*Translated from the Edition in French of Gustave Tripels. 1886. Paris: Arthur Rousseau.

No. 6 if they were made since the day when the vessel was ready and able to make the voyage, until the day when the voyage was considered as terminated.

The voyage is reputed terminated twenty-one days after the arrival of the vessel at destination unless the merchandise and effects are unloaded sooner.

The debts named in Nos. 3 and 4 enjoy the preference if made since the vessel came into port until the day of her sale.

7th. The expense of the necessary repairs of the vessel and her apparatus other than those above mentioned under No. 6, during the three last years, from the day when the repairs were completed.

8th. The claim for the building of the vessel and interest due for the three last years.

9th The sums loaned as bottomry loans upon the hull and keel of the vessel and her apparatus, for the victuals, fitting out and equipment, and for which the contract was executed previous to the departure of the vessel, excepting the premium on the bottomry loan.

10th. The damages due to the freightors or charterers for default in delivering the merchandise or for reimbursement of the average sustained by the said merchandise by the fault or dishonesty of the captain or the crew.

V.

German Code of Commerce.

Book 5, Title 10.*

Art. 772. The claims which concern the same voyage, as well as those which are considered as concerning the same voyage (Art. 771,) are to be liquidated in the following order:

*Book 5 treats of the navigation legislation of the German Empire.

1. The public ship, navigation and port charges (Art. 757, par. 3.)

2. The claims of the crew arising out of contracts of service and hire (Art. 757, par. 5.)

3. Pilotage, as well as salvage, claims for assistance, redemption and costs of restitution, (Art. 757, par. 5,); the contributions of the vessel for general average (Art. 757, par. 6,); claims arising out of bottomry, and similar transactions upon credit, contracted by the master in cases of necessity, as well as the other demands which are considered of equal standing, (Art. 757, par. 7.)

4. Claims for non-delivery of, or damage to merchandise and traveller's effects.

5. Claims mentioned in Art. 757, par. 9 and 10.

The claims which in the above article are placed in the third rank on an equality with bottomry, etc., are according to Art. 757, par. 7 as follows:

Art. 757, par. 7. The claims of bottomry creditors, to whom the ship is bound, as well as other claims arising from transactions upon credit, contracted by the master, as such, in cases of necessity, while the vessel is in a place other than her home port (Art. 497-510,) even though the master is part, or sole owner of the vessel, these claims arising out of such transactions upon credit—are of equal rank to claims for anything delivered or labor furnished, without the granting of credit, to the master of the vessel, as such, in a place other than her home port, in cases of necessity, for the preservation of the vessel, or the completion of the voyage, as far as these things delivered and labor furnished, are necessary to relieve the wants of the vessel.

The claims which in the above article 772, are placed in the lowest rank, comprise, according to Art. 757, par. 9 and 10, other contractual liens of the master and owner, and debts of the crew. No mention is made of collision.

VI.

The Maritime Law of Norway.

of July 20, 1893.

Chapter II. Maritime liens and the extinction of Maritime Claims.

§ 267. A claim for which a creditor, according to the rules of this chapter has a maritime lien (maritime claim) shall be privileged to satisfaction out of the proceeds of the thing on which the lien attaches after the public dues chargeable thereon, but before all other claims.

§ 268. A maritime lien upon the ship and the freight shall attach to the following claims:

1. Pilotage, salvage and expenses incurred in rescuing a ship from enemies.

2. The claims of the master and the crew for wages and other remuneration to which they are lawfully entitled for service on board the ship.

3. Claims for contribution to general average and expenses to be apportioned according to similar rules (§ 161, 2d par. and § 218, 2d par.) bottomry claims, and the claims of the owners of the cargo for goods sold during the voyage for the requirements of the ship.

4. Claims arising from obligations undertaken by the master in his capacity as such, or from non-fulfillment of contracts concluded by the owners of the ship, personally, or by deputy, and which it was the duty of the master to fulfill (see § 7); claims for compensation for damage caused through the fault or negligence of any person employed on board in the service of the ship (see § 8), and the claims of the master for money paid out, or undertaken to be paid by him, for the purpose of covering the expenses of the ship.

A maritime lien upon the ship shall also include the apparel of the ship, but not provisions, fuel, coal or other engineer's stores. A maritime lien upon the freight shall attach to the gross freight for the voyage upon which the

claim originated. A maritime lien for a bottomry claim shall attach to the ship or the freight, or both, according to the wording of the bottomry bond. See § 175.

§ 269. The claims enumerated under a maritime lien enumerated in § 266, shall be satisfied in the serial succession in which they are therein named, provided all of them have arisen under the same voyage. Claims coming under a like number shall all have equal rights, but, however, in such manner that when claims under Nos. 1 and 3, have not originated from one and the same case of emergency, the later claim shall take precedence of the earlier one.

If the several claims date from different voyages, the claims arising from a later voyage shall take precedence of those arising from an earlier voyage; but the master and crew shall retain their preferential claims on the ship for so much of the wages due to them under the last agreement as may amount to pay for, at most, the last 12 months even if during that time the ship has made several voyages.

VII.

Code of Commerce of Spain,

Passed August 22, 1885.

BOOK III. TITLE I

Art. 580. In all judicial sales of a vessel for payment of creditors, they rank in the order enumerated:

1. Credits in favor of the public treasury, which are proven by the official certificate of the proper authority.

2. The judicial costs of the proceeding, as taxed and approved by the judge or Court.

3. Pilotage, tonnage, sea and other port charges, proven

by sufficient certificates of the officials in charge of the collection of these claims.

4. The wages of the keepers and watchmen of the ship, and any other expense incurred in her preservation, since her arrival in port and until the sale, which may have been paid or be due, according to verified claim approved by the Judge or Court.

5. The expense of the warehouse in which the apparel and appurtenances of the ship have been stored, according to agreement.

6. The wages of the master and crew on the last voyage, proven by liquidation, from the ship's roll and books, and approved by the chief of the branch of the merchant marine where the vessel may be, and if there is no such official at the place, by the Consul, Judge or Court.

7. The reimbursement of the value of the cargo sold by the master to repair the ship, provided, however, that the sale has been ordered by a judicial decree according to the formalities required in such cases, and noted on the certificate of the ship.

8. The unpaid purchase money due the last vendor of the ship, and credits due for material and labor used in the construction of the ship before her first voyage, and those proceeding from repairs and equipment of the ship, and from provisions and coal, on the last voyage.

To entitle the credits under this subdivision to preference, the contract for the same must appear to be recorded in the Mercantile Register, unless the credits were incurred while the ship was on a voyage and had not returned to her port of registry, in which event they are to be recorded with all the formalities required in such cases, and also noted in the certificate of the ship.

9. The sums advanced upon the hull and keel of the ship, and her apparel and appurtenances, before her departure, justified by the contracts executed according to law, and recorded in the Mercantile Register; and also the sums advanced during the voyage for the credits enumerated in the last subdivision, provided the same are recorded

and noted as required by said subdivision; and the premiums of insurance according to the policy, or certificate from the books of the underwriter.

10. The indemnity due the freighters for the value of the goods shipped, which have not been delivered to the consignees, or for damages suffered for which the vessel is responsible, provided the claims are recorded in the sentence of the judge or arbitrator.

Article 581.—If the proceeds of the sale are insufficient to pay the creditors comprised in the same number or rank, the sum remaining shall be divided among these creditors, *pro rata*.

The question certified by the Circuit Court of Appeals, should be answered in the negative.